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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1323

HUBBARD BROADCASTING, INC., JERRY DANZIGER, RICHARD McKEE, LEO ZANI, DIANE DIMOND, JOHN DOE and JANE DOE, *Petitioners,*

vs.

M. A. AMMERMAN, JERRY LANDAVAZO, JAMES D. WEBB and JIM GOLDEN, *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

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OPINIONS BELOW

The opinion of the Court of Appeals of the State of New Mexico reversing the District Court of Bernalillo County, included as Appendix A to the Petition, is erroneously stated to be not reported. It is reported, and cited as 91 N.M. ....., 572 P.2d 1258 (Ct. App.), cert. denied, ... N.M. ....., 572 P.2d 1257 (Ct. App. 1977). There is included in this brief our Appendix A, which is an Order on an Original Proceeding for a Writ of Prohibition or Superintending Control before the New Mexico Supreme Court. Appendix E to the Petition is the pro forma Order in the same proceeding denying a motion for rehearing and permanently quashing the writ.

JURISDICTION

Petitioners purport to invoke the jurisdiction of this Court under United States Supreme Court Rule 19(1)(a). Respondents submit that jurisdiction can be invoked only under 28 U.S.C.A. §1257(3), and urge that jurisdiction is improper, in that the judgment below is not final, as is argued in POINT II herein.

STATEMENT OF THE CASE

Statement of Facts Material to Consideration of the Questions Presented.

Respondents take issue with many of the factual matters set forth in the Petition. We respectfully set forth only those thought specifically relevant to the consideration of the Petition.

Petitioners' statement of facts recites that the District Court had determined that disclosure of confidential informants would not lead to evidence on actual malice. The Court of Appeals of New Mexico found, to the contrary, that the District Court had previously ordered disclosure, and had determined disclosure was necessary. (Petition Appendix 24-26). The Court of Appeals felt that the District Court had applied an erroneous legal standard, and that there was substantial evidence upon which to doubt the veracity of the defense informants. (Petition Appendix 26). The trial court's conflict arose because it entered orders and findings upon two separate occasions, though based upon identical evidence. Its findings differed on this issue.

Both the Court of Appeals and Supreme Court of New Mexico were impressed that Defendants (Petitioners herein) agreed to comply with the in camera hearing

procedure mandated below on the issue of disclosure of informants. (Petition Appendix 24, Appendix A to this brief). This factual finding is of paramount import, since the Petition is in large part predicated upon an argument that ordering disclosure of informants' identities, or at least ordering an in camera hearing, is a denial of their constitutional rights.

With respect to matters contained in Petitioners' statement of facts relating to individual respondents, there are additional facts relevant to the cases present. As to Lieutenant Mort Ammerman, he has denied that he made trips to El Paso, Texas for the purpose of obtaining an illegal alien to serve as housekeeper for the Sheriff, or that the alleged housekeeper's fate was of personal interest to him. (Transcript 596, 766, 767).[1] The material broadcast was not substantially true, since the record reflects all trips to the El Paso area were on official business. This was known to Petitioners prior to their broadcasts, on the basis of the Affidavit of Joseph P. Collins. (Transcript 614-615). Further, Ammerman states in an Affidavit of record that he spoke with Leo Zani, a Petitioner herein, approximately one month after the broadcasts in question, and that Zani admitted there was no truth to the assertion made in the broadcast that he violated federal law in transporting an illegal alien, or that he was interested in her fate. (Transcript 597-598).

With respect to Deputy Sheriff Jerry Landavazo, the record below reflects the allegations broadcast were absolutely false; Jerry Landavazo never served time in a penitentiary in Arizona or elsewhere. (Transcript 629). While the reporters were shown a rapsheet with Landavazo's name upon it, they admit they never had the

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1. References in the Statement of Facts to "Transcript" are references to the record below before the New Mexico Court of Appeals.

opportunity to read the contents of that document. (Transcript 1134). Knowledge of confinement in the Arizona State Penitentiary was a matter of public record, available to anyone. (Transcript 442). Finally, the nature of the telephone call by one of Petitioners to Landavazo must be set in proper perspective. The call was at 2:00 a.m. The individual calling refused to identify himself, refused to identify his mission or affiliation, and, so far as Landavazo knew, inexplicably asked if he had ever been in jail. After repeated failure of the caller to identify himself, Landavazo informed this apparent crank caller he did not have to answer questions like that, whereupon the caller terminated the conversation, still without any explanation. (Transcript 627-634).

With respect to Deputy Sheriffs Golden and Webb, the Petitioners herein relied upon a retraction by Lt. Golden that he had *written* orders to be at the Santa Fe racetrack on official business to justify a broadcast that he had no authority at all; that he and Sgt. Webb were not on official business; and that they had misused county credit cards. Sgt. Webb's testimony at the trial of Sheriff Wilson was deliberately ignored by Petitioners, however, since it was unfavorable to their contentions that Webb, too, was not in Santa Fe on official business. The truth of the allegations has not been established. Similarly, despite the decision in another hearing that Clara Lucero was removed from jail in violation of the court's orders (Petitioner's Brief, p. 9), the issue in this case is whether the broadcast concerning that incident was true. Sgt. Webb will show, at a trial on the merits, that Clara Lucero was removed from jail upon orders of another district judge of equal authority to the judge who found him in contempt. There is no evidence, other than in Petitioners' minds, that the Golden and Webb broadcasts were "substantially true." There are questions of fact which precluded entry of summary judgment.

ARGUMENT

POINT I

The Decision of the Court Below Rests on Adequate and Independent State Grounds: the Standard to Be Applied in Consideration of a Motion for Summary Judgment and the Finding That Defendants Had Agreed to in Camera Disclosure of Confidential Informants.

These consolidated cases, although over two years old, are yet in the infancy of factual development. Discovery has not been completed. The judgment upon which review is sought by Petitioners is a reversal of summary judgment, remanding the causes to the trial level. The lack of adequate factual development in these cases make meaningful factual analysis difficult, as is clear from the divergence in the statements of fact.

According to Petitioners, the New Mexico Court of Appeals misconstrued the "actual malice" test announced in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its successors. Even cursory examination of the opinion of the Court of Appeals shows its understanding of "actual malice" as a term of art in defamation suits. The Court of Appeals clearly states that actual malice means that the Petitioner broadcasters either published with knowledge of the falsity of statements made, or had a high degree of awareness of probable falsity, or entertained serious doubt as to the truth of statements made, but nevertheless aired them. (*See*, Petition Appendix 14).

Much of the Petition reviews the actual malice and reckless disregard standards. But there is really no conflict between those standards and the Court of Appeals

opinion. The real issue decided by the Court of Appeals deals rather with the burden of that standard upon motion for summary judgment. That question, we submit, is one peculiar to state practice which does not rise to constitutional dimensions.

The Court of Appeals held, in essence, that whether evidence of actual malice had been presented was irrelevant unless and until the moving party showed the absence of a genuine issue of fact as to the actual malice. This is a commonplace rule in summary judgment practice; the moving party must show there is no genuine issue of material fact. The New Mexico and Federal Rules are identical in this respect. Rule 56, Federal Rules of Civil Procedure; Rule 56, New Mexico Rules of Civil Procedure. The Court of Appeals held that Defendants, Petitioners herein, must show they did not have knowledge of the admitted falsity of the statements made, and must further show facts upon which a lack of reckless disregard may be based. Then, and only then, does the burden shift. Only then must Plaintiffs, Respondents herein, show evidence as to actual malice. The Court of Appeals held Defendants had not established lack of actual malice on their part. (Petition Appendix 17, 20). This finding is neither directly challenged nor raised as a question in the Petition.

The Court of Appeals has decided that defamation cases must be measured against the same summary judgment standards generally applied in civil litigation. Application of ordinary civil litigation standards in defamation cases has been followed by other courts. *Tagawa* v. *Maui Publishing Company,* 427 P.2d 79 (Hawaii, 1967); Cf., *Guam Federation of Teachers, Local 1581, A.F.T.* v. *Ysrael,* 492 F.2d 438 (9th Cir. 1974); *Phoenix Newspapers, Inc.* v. *Church,* 24 Ariz. App. 287, 537 P.2d 1345 (1975), cert. denied, 425 U.S. 908 (1976). The determination that Petitioners failed to meet their burden on summary judgment is a far different issue than the one Petitioners set forth, i.e. that the Court of Appeals incorrectly applied the actual malice test.

That the moving party on summary judgment in defamation cases has the burden of showing the absence of a genuine issue of material fact is not specifically challenged here. Even if it were, it would appear that this is a procedural matter and thus a question of practice and pleading according to state court standards. So long as, in the final result, compliance with constitutionally mandated standards is met, the procedure is a matter to be left to the state. Cf., *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976).

Respondents have the heavy burden of showing actual malice. But until its absence is shown, we do not have to shoulder that burden for purposes of summary judgment.

The second point raised in the Petition deals with the order requiring Petitioners to disclose the identity of confidential informants. At the outset, it must be noted that this is not a blanket order of disclosure. The opinion of the Court of Appeals specifies that an in camera hearing be held, and that the trial court then decide whether release of the identity of the informants will lead to persuasive evidence on the issue of actual malice. (Petition Appendix 24). The determination by the trial court on the release of identity is to include findings on the reliability of the sources, prior knowledge of falsity of the alleged defamations, and whether reliance on the sources was reckless. (Petition Appendix 24). This is a narrow and specific disclosure order, clearly designed to protect the rights of all litigants.

The issue of the constitutionality of the disclosure order is moot because of the finding of the appellate courts below that Petitioners agreed to the disclosure procedure. In that respect, the Court of Appeals observed that ". . . Defendants have agreed to comply with this order." (Petition Appendix 24). Similarly, the New Mexico Supreme Court, in an extraordinary writ proceeding, held that Defendants had made an offer of disclosure substantially similar to that specified by the Court of Appeals. (Appendix A to this brief).

Petitioners appear to question, not the propriety of disclosure generally, but the propriety of disclosure where they claim disclosure would not be calculated to discover evidence that would tend to establish malice or reckless disregard. Thus, they seek review not on the basis of the standard, but rather on the factual determination. They ask this Court to make again a factual determination of the sufficiency of the evidence. This is not the role of the Supreme Court. It is clear that disclosure was not lightly ordered. Repeated protestations of Petitioners to the contrary, the Court of Appeals held that the broadcasts were not true. (Petition Appendix 17). The Court of Appeals specifically ordered the trial court to conduct an in camera inspection, and then make its determination as to disclosure. The trial court is to file specific findings on the reliability of the sources, any misrepresentation by Defendants, any prior knowledge of falsity by Defendants and whether reliance on the sources was reckless. Then, and only then, shall the trial court decide whether to order disclosure.

The order of disclosure complained of only requires an in camera inspection by the trial court. This is an in camera inspection Petitioners have long ago agreed to comply with. The Petitioners' argument regarding disclosure to Respondents is both premature (for disclosure to anyone other than the trial court has not yet been ordered), and a question of state law, since it has been found that Petitioners agreed to an in camera examination.

POINT II

The Decision of the Court Below Is Merely One Reversing Summary Judgment and Is Not a Final Judgment.

Jurisdiction of the Supreme Court has long been predicated upon entry of a final judgment below. Petitions for certiorari to a state court are dependent upon a final judgment or decree having been entered. 28 U.S.C. §1257. Petitioners were granted summary judgment by the trial court; the New Mexico Court of Appeals reversed. The consolidated cases are remanded for further discovery, for the possibility of summary judgment being entered again as to some plaintiffs, and for eventual trial.

It is clear that a trial may well dispose of this case. It had been determined that Respondents are public officials, and that the actual malice-reckless disregard standard is applicable. The question of actual malice will be left to the jury. In a real sense, the decision below is not final. Much remains to be done.

In *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975), four separate categories were recognized in which a decision may be treated as final for purposes of 28 U.S.C. §1257 even though additional proceedings were anticipated in the lower state courts. The facts of this case squarely fall without each recognized category. The first two categories are those in which the federal issue would be unaffected because remaining proceedings are insubstantial or unrelated to the federal question. *Cox Broad-*

casting Corp. v. *Cohn,* 420 U.S. at 478-480. Here, the federal issues, primarily the application of the actual malice standard, remains of import for future summary judgment proceeding and actual trial. The New Mexico Court of Appeals decision allows consideration of the federal issues; they will survive and be as present after trial as they now are. The federal issues will in fact be enhanced for Appellate review, since they will rest on adequate factual development, which is now not true. The remaining two categories involve cases wherein either the federal question would be procedurally barred by subsequent state proceedings, or where reversal of the State Court on the federal issue would be preclusive of any further litigation. *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. at 481-486. There is no apparent bar here of any federal question. Actual malice will remain an issue. Disclosure of the identity of informants is now only a possibility, not a probability. Even if disclosure is ultimately ordered, compliance with the safeguards set forth in the Court of Appeals opinion will still be an issue. The Supreme Court of New Mexico earlier noted on the same issue that review by extraordinary means could be sought. (Appendix A to this brief). Finally, the last category is concerned with cases in which the federal issue is plainly and finally decided, not subject to further review, and where reversal on the federal issue is preclusive of further litigation, and not merely controlling on the nature and character of proceedings. *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974). Again, the issues of actual malice, and the sufficiency of the evidence, will remain for Appellate review even after trial by jury. A decision on the issue of disclosure of identity of informants cannot, of itself, terminate this litigation. Even without disclosure, Respondents could, as a logical proposition, prevail at trial. This possibility runs counter to the premises of the last

category, and, as has been noted, the only disclosure ordered is that an in camera hearing be held, and that disclosure thereafter be determined.

No statute or isolated principle of federal law is drawn into question. This is simply a reversal of an order granting summary judgment on issues complexly embracing federal questions. Defamation and the First Amendment are complex areas of the law, and Petitioners here seek to raise arguments on the merits of the case, rather than on the propriety of reversing summary judgment. If review should be had upon issues such as Petitioners present, it should be reviewed upon a full trial of the facts and the law applied to those facts by the trial court. Sketchy factual developments and continuing state jurisdiction over these cases and the implicit federal questions militate against this Court accepting cases such as this one. The decision below simply lacks finality.

POINT III

The Order of Disclosure Is Calculated to Insure That Only Evidence Relevant to Actual Malice Will Be Released; It Thus Fully Protects All Rights of All Parties.

Many of the cases cited by Petitioners are urged for the proposition that there should be at least some limited or qualified privilege for newsmen to withhold disclosure of confidential sources. Assuming the propriety of that position, this case does not present any substantial conflict. As has been noted, only an in camera review has been ordered. (Petition Appendix 24). Thereafter, before disclosure to Plaintiffs, the trial court must make specific findings as to reliability, prior knowledge, falsity and reckless reliance. These standards are far more strict and exacting

than those in *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), a leading case urged by Petitioners. *Cervantes* speaks only of "some factor" supporting serious doubt as to truth of the matters asserted. Here, specific findings are required.

The only other objection which Petitioners could raise, though it was unvoiced, is that they object to an in camera determination by the trial court. The Court of Appeals determined that Defendants had not met their burden on summary judgment, and that the broadcasts were false. They also found evidence upon which to predicate, at the least, a minimal showing of reckless disregard. Thus, there were grounds upon which to order complete disclosure. Ordering an in camera examination, instead, is an extremely conservative method. This Court has held that in camera review is an appropriate means of dealing with a claim of governmental privilege. *Kerr* v. *United States District Court for the Northern District of California*, 426 U.S. 394, 406 (1976); *United States* v. *Nixon*, 418 U.S. 683, 706 (1974); *United States* v. *Reynolds*, 345 U.S. 1 (1953). The same considerations which commend an in camera review are present here. Petitioners assert an issue of privilege. In camera review provides the proper balance between claims of irrelevance and privilege on the one hand, and relevance and materiality on the other. Cf., *United States* v. *Nixon, supra*. The order of the Appellate Court below is eminently reasonable; one designed to protect the rights of all litigants. In such a case, no good reason appears for granting the writ.

CONCLUSION

The Appellate Court below has made a reasonable decision on what is only an interlocutory matter—reversal of the grant of summary judgment. The New Mexico Court of Appeals applied traditional summary judgment standards, and found that the Petitioners had failed to meet their burden—they had not shown the truth of the matters broadcast, and had failed to show a lack of actual malice on their part. Moreover, as the Court noted, Petitioners agreed to the order of disclosure, at least insofar as it requires an in camera examination by the trial court. There are no novel questions of law raised herein, no burning issues requiring resolution. Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Thursday, September 16, 1976

NO. 11,043

HUBBARD BROADCASTING, INC.,
LEO ZANI, RICHARD McKEE and
DIANE DIAMOND,
Petitioners,

vs.

THE HON. RICHARD B. TRAUB,
District Judge of the Second
Judicial District, State of
New Mexico,
Respondent.

ORDER

THIS MATTER having come on for consideration by the Court upon the Alternative Writ of Superintending Control and Alternative Writ of Prohibition heretofore issued herein and the briefs and arguments of counsel, and it having been made to appear to the Court that the district court recognizes the gravity of the issues involved in this case; that defendants have offered the tape recordings of their interviews with the confidential informants for an in camera examination by the district court; that defendants have agreed to an in camera interview

of the confidential informants by the district court; and that the district court has expressly ordered:

> "That prior to any order of disclosure, the Court shall give not less than ten days' notice of its intention to order disclosure so as to permit defendants to take whatever appropriate measures they deem necessary to object to any order of disclosure contemplated by the Court."

NOW, THEREFORE, it is the opinion of this Court that the district court has ordered no more than in effect has been offered by defendants, and by its order has adequately protected defendants and the confidential informants against any improper disclosure of the identity of said confidential informants which the district court might hereafter order. Consequently, it is the decision and order of this Court that the Alternative Writ of Superintending Control and Alternative Writ of Prohibition heretofore issued on the 22nd day of July 1976 should be, and it is hereby, vacated and quashed.

/s/ LaFel E. Oman
LaFel E. Oman, Chief Justice

WE CONCUR:

/s/ John B. McManus, Jr.
John B. McManus, Jr., Justice

/s/ Mack Easley
Mack Easley, Justice